Congress "considers the right to interconnect an important one which the Commission shall seek to promote, since interconnection serves to enhance competition and advance a seamless national network."[29] Such statutory language and legislative history define LEC-CMRS interconnection as an area where "Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the states to supplement federal law."[30]

Finally, Section 332(c) expresses a Congressional mandate for the Commission to encourage robust competition in a nationwide CMRS market. In this regard, the legislative history states that Section 332 is intended to "foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure."[31] Further, the Commission is commanded to undertake an annual review of "competitive market conditions with respect to commercial mobile services," and based on that report, to promulgate regulations that will "promote competition among providers of commercial mobile services."[32] In the case of LEC-CMRS interconnection, the FCC has determined that bill and keep compensation will promote fair competition.[33] Thus, the Commission is empowered to promulgate nationwide rules mandating LEC-CMRS interconnection.

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[29] H.R. Rep. No. 111, 103rd Cong., 1st Sess. 261 (1993) ("House Report").

[30] *Louisiana PSC*, 476 U.S. at 368.

[31] House Report at 260.

[32] 47 U.S.C. § 332(c)(1)(C).

[33] *Notice*, ¶ 61.

b. THE INSEPARABILITY DOCTRINE PROVIDES AN ADDITIONAL BASIS FOR PREEMPTING STATE REGULATION OF LEC-CMRS COMPENSATION ARRANGEMENTS

The inter- and intra-state aspects of LEC-CMRS interconnection are essentially inseparable. As an initial matter, the radio equipment, cables, and switches used to provide interstate communications are inseparable from those used to provide intrastate communications. In addition, as the Commission points out,[34] many interconnected calls begin as intrastate calls and become interstate calls, or vice-versa, as mobile customers cross and re-cross state lines. Indeed, assigning a particular jurisdictional status to any specific call is likely to be arbitrary. In the Washington, D.C. area, for example, a mobile phone with a 202 area code could be calling a 301 number in Maryland while driving along the George Washington Parkway in Virginia and eventually merging onto the Beltway and driving into Maryland. The call, when initiated, might be handled by a base station in Georgetown and then handed off to other base stations in Virginia and Maryland. Such an unremarkable calling scenario defies rational description as either interstate or intrastate.

Against this background, the inseparability doctrine, as set forth in *Louisiana PSC* and related cases, provides the FCC with an additional basis for denying state jurisdiction over LEC-CMRS interconnection rates. In *Louisiana PSC*, the Court carved out an exception to the states' exclusive jurisdiction over intrastate

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[34] *Notice*, ¶ 112.

communications under Section 2(b) of the Communications Act.[35] Specifically, the Court held that "where it was not possible to separate the interstate and the intrastate components of the asserted FCC regulation," the federal regulation must preempt state law.[36] More broadly stated, where "compliance with both federal and state law is in effect physically impossible," federal law must prevail.[37]

Subsequently, in *Public Service Commission of Maryland v. FCC*,[38] the D.C. Circuit applied the inseparability analysis in holding that the FCC had the power to preempt state regulation of the rates LECs charge for discontinuation of interstate *and* intrastate telephone service.[39] In upholding the FCC's jurisdiction, the court stated that preemption is permitted if:

> (1) the matter to be regulated has both interstate and intrastate aspects; (2) FCC preemption is necessary to protect a valid federal regulatory objective; and (3) state regulation would negate the exercise by the FCC of its own lawful authority because regulation of the interstate aspects of the matter can not be unbundled from regulation of the intrastate aspects.[40]

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[35] "Except as provided in . . . section 332 of this title . . . nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, for or in connection with intrastate communication service by wire." 47 U.S.C. § 152(b).

[36] *Louisiana PSC*, 476 U.S. at 376 n.4 (citing *North Carolina Utilities Comm'n v. FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976); *North Carolina Utilities Comm'n v. FCC*, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977)).

[37] *Id.* at 368.

[38] 909 F.2d 1510 (D.C. Cir. 1990) ("*PSC of Maryland*").

[39] *Id.* at 1516.

[40] *Id.* at 1515 (internal quotations and citations omitted).

LEC-CMRS interconnection meets all three prongs of this test. First, such interconnection has both interstate and intrastate aspects in that some interconnected calls are interstate, while others are intrastate. and indeed, as noted above, many are both. In addition, even regarding intrastate interconnected calls, courts have "frequently held" that services such as LEC-CMRS interconnection "which support access to the interstate communications network have interstate as well as intrastate aspects."[41] Thus, even the interconnection of intrastate CMRS calls has interstate aspects, given that this interconnection "substantially affect[s]" interstate communications.[42]

Second, the federal government has a vital interest in the development of a nationwide wireless infrastructure. This interest is evidenced by the Commission's determination that CMRS facilities -- even those used largely for intrastate traffic -- are important links in an interstate "network of networks."[43] Further, most new CMRS networks are interstate in their own right. Most prominently, broadband PCS is being licensed based on service areas that are drawn without regard to state boundaries.[44] Similarly, wide-area SMR is being licensed based on the Department of Commerce's

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[41] *PSC of Maryland*, 909 F.2d at 1515.

[42] *Lincoln Tel. and Tel. v. FCC*, 659 F.2d 1092, 1109 n.85 (D.C. Cir. 1981). *See also New York Telephone v. FCC*, 631 F.2d 1059, 1066 (2d Cir. 1980) (the FCC has jurisdiction over LEC "surcharges on interstate [private line] users" because they "substantially affect[] the conduct or development of interstate communication").

[43] *Notice*, ¶ 5.

[44] *Amendment of the Commission's Rules To Establish New Personal Communications Services (Second Report and Order)*, 8 FCC Rcd 7700, 7733 (1993).

Economic Areas, another interstate service area.[45] Thus, the FCC has jurisdiction over this important aspect of the nation's interstate telecommunications infrastructure.

Third, regulation of the interstate aspects of LEC-CMRS interconnection can not be unbundled from regulation of the intrastate aspects, a point which is best illuminated in *Public Utility Commission of Texas v. FCC*,[46] and *Illinois Bell Telephone Co. v. FCC*.[47] In *PUC of Texas*, the FCC was permitted to preempt state regulations limiting the ability of private microwave network users to interconnect to the LEC of their choice. Such preemption was premised on the inability of the interconnecting carrier to separate its interstate calls from its intrastate calls: "Because of the dual interstate and intrastate use of the private microwave and carrier facilities here at issue . . . acceding to the state action in this case would necessarily negate the federal right of interconnection to the interstate network . . ."[48]

Similarly, in *Illinois Bell*, the court used the inseparability doctrine to uphold the FCC's preemptive rules which required Bell Operating Companies ("BOCs") to allow independent vendors the opportunity to market their customer premises

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[45] *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of An SMR System in the 800 MHz Frequency Band*, FCC 95-501 (released Dec. 15, 1995).

[46] 886 F.2d 1325 (D.C. Cir. 1989) ("*Texas PUC*").

[47] 883 F.2d 104 (D.C. Cir. 1989). *See also People of the State of California v. FCC*, 1996 WL 35901 (9th Cir. 1996).

[48] *Texas PUC*, 886 F.2d at 1334.

equipment along with BOC Centrex services.[49] *Illinois Bell* is of particular interest because the court noted that although the Commission could segregate the costs associated with Centrex marketing into interstate and intrastate components, "this regulatory accounting treatment does not negate the mixed interstate-intrastate character of services like Centrex."[50] The same analysis plainly holds true for LEC-CMRS interconnection.

c. THE TELECOMMUNICATIONS ACT OF 1996 REINFORCES THE COMMISSION'S AUTHORITY TO MANDATE TERMINATING COMPENSATION ARRANGEMENTS

As discussed more fully in section II.B.2.a of these comments, Section 332(c) of the Communications Act of 1934, as amended, provides the Commission with plenary authority to mandate terminating compensation arrangements for LEC-CMRS interconnection. The Telecommunications Act of 1996 ("the 1996 Act") confirms and further buttresses that authority. Such additional authority stems from Section 251 of the 1996 Act, relating to interconnection, Section 252, relating to procedures for the approval of interconnection agreements, and Section 253, relating to removal of state barriers to entry. Taken together, these provisions evince a clear Congressional intent

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[49] *Illinois Bell*, 883 F.2d at 116 ("[s]ince the intrastate and interstate elements of Centrex and like services can not be severed into discrete packages so as to permit separate state and federal regulation of the manner in which these services are marketed jointly with CPE . . . the Act permits the Commission to assert plenary jurisdiction . . .").

[50] *Id.* at 114.

to allow the Commission to implement preemptive rules mandating a reasonable form of terminating compensation for interconnected services.

Under Section 251, "[e]ach local exchange carrier has the . . . duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications."[51] In addition, incumbent local exchange carriers[52] must provide interconnection "on rates, terms, and conditions that are just, reasonable and nondiscriminatory."[53] Section 252 illuminates the "just, reasonable and non-discriminatory" language of Section 251 by stating that

> the terms and conditions for reciprocal compensation [shall not be considered] to be just and reasonable unless -- (i) such terms and conditions provide for the *mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier . . . .*[54]

Further, under Section 252, "arrangements that waive mutual recovery (such as *bill-and-keep arrangements*)" are explicitly considered to be within the realm of "just and reasonable" reciprocal compensation schemes.[55]

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[51] 47 U.S.C. § 251(b)(5).

[52] Incumbent LECs are those that are members of the exchange carrier association pursuant to 47 C.F.R. § 69.601(b). 47 U.S.C. § 251(h)(1).

[53] 47 U.S.C. § 251(c)(2)(D).

[54] 47 U.S.C. § 252(d)(2)(A) (emphasis added).

[55] 47 U.S.C. § 252(d)(2)(B)(i) (emphasis added). As discussed above, bill and keep makes eminent sense for broadband CMRS/LEC interconnection. It is inappropriate, however, in the narrowaband CMRS context, where traffic flows are virtually one hundred percent mobile-terminating.

The structure of the interconnection sections of the 1996 Act demonstrates Congress's intent to provide the Commission with broad authority to supervise, and indeed, supersede state regulation of interconnection. First, Section 251 empowers the Commission to promulgate rules that require incumbent local exchange carriers to provide interconnection "on rates, terms, and conditions that are just, reasonable and nondiscriminatory."[56] This Section further cautions that state interconnection regulations must be "consistent with the requirements" of Section 251 and must "not substantially prevent implementation of the requirements of [Section 251]."[57]

Because the Commission is empowered to define the contours of Section 251, that section and Section 252, when read together, grant the Commission the power to set the guidelines for state approval of LEC-CMRS interconnection agreements. (Notably, Section 252 directs state commissions to review only non-voluntarily negotiated interconnection agreements,[58] further constricting the states' role.) That is, if the Commission determines that a particular form of terminating compensation is necessary to implement the requirements of Section 251, states are forbidden to require inconsistent schemes -- and they certainly may not, in light of Section 332, require compensation rates that differ from those mandated by the Commission. In the

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[56] 47 U.S.C. § 251(c)(2)(D).

[57] 47 U.S.C. § 251(d)(3).

[58] Voluntarily negotiated interconnection agreements do not have to be consistent with Section 251, but must rather not discriminate against carriers not parties to the agreement, and be "consistent with the public interest, convenience, or necessity." 47 U.S.C. § 252(e)(2)(A).

CMRS/LEC context, where Section 332 has already preempted much state involvement, the state role is limited, at most, to examining terms and conditions. The Commission, and the Commission alone, has authority to assess the lawfulness of CMRS/LEC interconnection rates. Accordingly, Section 332 combines with the 1996 Act to give the Commission a powerful tool for assuring that its CMRS policy goals are fully achieved.

Further evidence of this potent combination, and of the preemptive intent of Congress, is found in Section 253. That Section generally negates state or local statutes or regulations that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate service."[59] The prohibition of such barriers emphasizes that "[n]othing in this section shall affect the application of section 332(c)(3) to commercial mobile radio service providers."[60] Thus, the 1996 Act not only prohibits states from enacting compensation schemes for LEC-CMRS interconnection that serve as barriers to entry, but also expressly recognizes the continued vitality of the preemptive provisions of Section 332(c)(3) regarding CMRS regulation -- under which, as discussed above, the FCC may establish a mandatory terminating compensation scheme for LEC-CMRS interconnection.

PCIA wishes to emphasize that the Commission should press forward with this rulemaking on an independent, expedited basis, rather than combining it with any of

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[59] 47 U.S.C. § 253(a).

[60] 47 U.S.C. § 253(e).

the rulemakings associated with the 1996 Act. The issue of LEC-CMRS interconnection has a long and well-established history; therefore, the background issues are already well framed, and the issues particular to this proceeding will be fully briefed by the close of the reply comment deadline. Without prompt Commission intervention, the unsatisfactory experience of the past ten years will be perpetuated, and the growth and development of broadband and narrowband PCS will be constrained.

III. INTERCONNECTION FOR THE ORIGINATION AND TERMINATION OF INTERSTATE, INTEREXCHANGE TRAFFIC

In the *Notice*, the Commission tentatively concluded that CMRS providers should be able to recover access charges from IXCs, just as LECs do when interstate traffic passes from CMRS customers to IXCs by way of LEC networks.[61] PCIA agrees with the Commission that CMRS providers should be compensated for the use of their networks by IXCs. However, because interconnection arrangements between CMRS providers and IXCs fall into two distinct categories -- direct interconnection and interconnection through a LEC -- PCIA suggests that different rules govern each type of interconnection.

Although not recognized in the *Notice*, direct interconnection between CMRS providers and IXCs is significantly used today and becoming more prevalent. In these cases, compensation arrangements should be privately negotiated by the parties, without FCC intervention or the filing of access tariffs by CMRS providers. Such private agreements are in the public interest because, in the absence of either party possessing monopoly power, market-based incentives are the best means of providing low cost communications to the American public.[62] CMRS providers do not have undue leverage when negotiating direct interconnection agreements with IXCs for a number of

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[61] *Notice*, ¶ 116.

[62] *Id.*, ¶ 4.

reasons. First, both parties profit from such interconnection, so there is no incentive for CMRS carriers to attempt to impose one-sided deals on the IXCs. Second, the cost of LEC-mediated interconnection serves as a ceiling on how much CMRS providers can charge for direct interconnection. Finally, there are an ever-increasing number of CMRS providers seeking such interconnection, thus providing IXCs with a significant ability to negotiate favorable arrangements.

Where interconnection occurs through a LEC, the revenues should be rationally divided between the CMRS provider and the LEC. Existing arrangements between independent telephone companies and Bell Operating Companies may be useful in structuring an appropriate compensation mechanism for CMRS providers. However, because CMRS providers do not possess market power, there is no need to impose a tariff filing requirement. Doing so would merely increase carriers' costs and drive up the price of their service offerings.

IV. APPLICATION OF THESE PROPOSALS

As these Comments show, it is imperative that the Commission adopt terminating compensation rules for *all* CMRS providers -- broadband and narrowband.[63] The economic, legal, and technical bases for doing so are beyond reasonable dispute.

From an economic standpoint, narrowband CMRS must be included in any fair compensation scheme because such providers use their networks to terminate landline-originating calls, just as broadband CMRS providers do, and such termination produces significant financial benefits for LECs. For example, LECs recognize revenues whenever the paged party uses the landline network to return a page or the calling party has measured service. LECs also realize significant access revenues from calls to paging customers with 800 numbers and from long distance calls back to the calling party. Finally, LECs enjoy considerable revenues from intraLATA toll calls generated by paged parties. Narrowband CMRS providers should share in the wealth they help to create.

Legally, the regulatory parity directive of Section 332 compels that terminating compensation rights extend to both broadband and narrowband CMRS providers. Indeed, this directive simply reinforces longstanding Commission practice. The

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[63] *Id.*, ¶ 118. As discussed above, however, the compensation mechanism must be different for these two categories of service provider in recognition of differences in the directionality of traffic.

Commission has always emphasized that its interconnection policies "apply to all public mobile service licensees, and not only to cellular carriers. Therefore, our policies and guidelines are equally applicable to the interconnection issues and negotiations involving non-cellular radio common carriers."[64]

From a technological perspective, convergence is blurring the lines between the services offered by broadband CMRS, narrowband CMRS, and landline LECs. As providers expand their service offerings and seek to offer one-stop shopping, parity of treatment will become increasingly necessary to assure fair competition. For example, availability of compensation to an integrated broadband/narrowband CMRS provider, but not to a standalone narrowband CMRS provider, would distort the marketplace. Absent equal treatment, the FCC will find its regulations having an important influence on the price of communications services. Such an outcome is contrary to the Commission's goal of a market-driven pricing structure.

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[64] *Interconnection Reconsideration Order*, 4 FCC Rcd at 2375.

V. CONCLUSION

The *Notice* properly recognizes that the Commission must exercise its leadership to assure that LEC-CMRS interconnection incorporates equitable and economically efficient terminating compensation. The proposals are a good first step in this regard. Nonetheless, they must be expanded and clarified in several respects in order to achieve the Commission's goals of promoting the development of CMRS and facilitating competition by CMRS licensees in providing local exchange services.

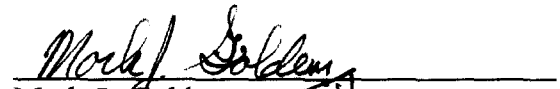
Specifically, the Commission must assure compensation for both broadband and narrowband CMRS providers. For broadband CMRS, the Commission should adopt an interim bill and keep compensation scheme, with the CMRS provider and LEC sharing the costs of trunks interconnecting the mobile and LEC switches, and should assure that any long-term plan allows each carrier to recover all costs associated with termination of calls on an economically efficient basis. For narrowband CMRS, bill and keep is inappropriate because, unlike the broadband situation, virtually all traffic is mobile-terminating. Narrowband CMRS providers accordingly should be entitled to recover the reasonable costs of terminating calls, and LECs should pay the cost of trunks interconnecting into the CMRS network. These rules should apply to both interstate and intrastate traffic.

To guard against discrimination and assure that interconnection agreements are reasonable, such agreements should be filed as Section 211 contracts. Contracts are

preferable to tariffs because they recognize the co-carrier status of CMRS providers and are mutually enforceable, while still allowing the Commission to intervene if rates are unlawful or terms are contrary to the public interest. Finally, the Commission should allow CMRS providers and IXCs to negotiate compensation arrangements where the IXC connects directly to the mobile switch, and should assure that CMRS providers are treated no less favorably than independent telephone companies when traffic to and from and IXC transits a LEC tandem. CMRS providers should not be required to file access tariffs because they have no incentive or ability to act anticompetitively.

Respectfully submitted,

PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION



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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of March, 1996, I caused copies of the foregoing "Comments of the Personal Communications Industry Association" to be hand-delivered to the following:

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